TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 43.

THE PHŒNIX INSURANCE COMPANY OF BROOKLYN, PLAINTIFF IN ERROR,

vs.

WILLIAM H. LANIER AND WILLIAM M. LANIER, AS W. H. LANIER & CO.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

FILED JANUARY 21, 1875.

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1 UNITED STATES OF AMERICA,
Southern District of Georgia:

Pleas before the fifth circuit court of the United States for the southern district of Georgia, at a term begun and holden at Savannah, on the Thursday after the first Monday, it being the 5th day of November, A. D. 1874, before the honorable John Erskine, district judge.

Transfer of cause from State to Federal court.

W. H. LANIER & CO.
vs.
THE PHŒNIX INSURANCE COMPANY OF Brooklyn, N. Y.

Be it remembered that on the 17th day of July, A. D. 1873, this cause was removed from the superior court of Chatham County, Georgia, and the petition was filed in the office of the clerk of the said circuit court in and for the southern district of Georgia in the words and figures following, to wit:

Petition.

In Chatham superior court, January term, 1873.

W. H. LANIER & CO.
vs.
PHŒNIX INSURANCE COMPANY. } Stat. act. on policy.

GEORGIA, *Chatham County:*

To the superior court of said county:

The petition of William M. Lanier and William H. Lanier, copartners, using the firm-name and style of W. H. Lanier and Company,
2 showeth that The Phœnix Insurance Company of Brooklyn, a body-corporate and doing business as an insurance company, and having agencies in the State of Georgia, and having an agency or place of doing business located at the time of the making of the contract here sued upon, and at the time this cause of action occurred, and at the commencement of this suit, in said county of Chatham, is indebted to them in the sum of twenty-five hundred dollars, besides interest, on a policy of insurance dated the first day of March, A. D. eighteen hundred and seventy-two, and due on the 8th of May, A. D. 1872, which said The Phœnix Insurance Compay refuses to pay.

Wherefore your petitioner prays process may issue requiring the said The Phœnix Insurance Company to be and appear at the next superior court for said county, to answer your petitioners' complaint.

RUFUS E. LESTER,
Pl'ff's Attorney.

3 *Copy of policy attached to petition.*

Stock company.] [No. 310.

By this policy of insurance the Phenix Insurance Company of Brooklyn, in consideration of twenty-two $\frac{50}{100}$ dollars to them paid by the insured hereinafter named, the receipt whereof is hereby acknowledged, do insure Wm. H. Lanier & Company against loss or damage by fire, to the amount of twenty-five hundred dollars, on his stock of dry goods, boots, shoes, groceries, liquors, and other merchandize not more hazard-

ous, contained in the brick metal-roofed building No. 185 Congress street, between Barnard and Jefferson streets, Savannah, Ga.

Other insurance, $2,500.

And the Phenix Insurance Company above named, for the consideration aforesaid, do hereby promise and agree to make good unto the said assured, their executors, administrators, or assigns, all such loss or damage, not exceeding in amount the sum insured, as shall happen by fire to the property, as above specified, during one year, to wit, from the first day of March, one thousand eight hundred and seventy-two, (at twelve o'clock at noon.) until the first day of March, one thousand eight hundred and seventy-three, (at twelve o'clock at noon,) the said loss or damage to be estimated according to the actual cash-value of the said property at the time the same shall happen; and to be paid within sixty days after due notice and proof thereof made by the insured, in conformity to the conditions annexed to this policy, unless the property be replaced by similar property of equal value and goodness, or the company have given notice of their intention to rebuild or repair the damaged premises.

Provided always, and it is hereby declared, that this corportion shall not be liable to make good any loss or damage by fire which may happen by means of or during any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, or any loss by theft at or after a fire; nor for loss or damage caused by removal of property from a building, except it be proved that such removal was necessary to preserve the property, in which case the damage shall be borne by the assured and by the companies respectively in the proportion that the sum hereby insured bears to the whole value of the property insured. And provided further, that if any other insurance has been or shall hereafter be made upon the said property (whether valid or not) and not consented to by this company in writing hereon, or if the said property shall be sold or conveyed, or the interest of the parties therein changed, or if this policy shall be assigned without the consent of the company obtained in writing hereon, or if the assured shall make any attempt to defraud the company, then, and in every such case, this policy shall be null and void. The commencement of foreclosure proceedings upon, or a sale under a trust-deed of, or the existence of a judgment-lien upon, or the issue or levy of an execution without actual possession against, any kind of property hereby insured shall render this policy null and void. In case of loss, the assured shall not be entitled to demand or recover on this policy any greater proportion of the loss or damage sustained to the subject insured than the amount hereby insured shall bear to the whole amount insured (whether the same shall be valid or not) on the said property. And if at the happening of any fire the assured shall have insurance under a floating policy or policies, not specific, but covering goods generally in various places not designated, and yet within limits which include the premises or property hereby insured, such policy, as between the assured and this company, shall be considered as co-insurance with this policy, anything in the floating policy to the contrary notwithstanding; and in case the assured hold any other policy on the property insured subject to conditions of average, this policy shall be entitled to like condition. And it is agreed, and declared to be the true intent and meaning of the parties hereto, that in case the above-mentioned premises are, at any time during the period for which this policy would otherwise continue in force, used for more hazardous purposes than that called for in the original contract of insurance, or if it be vacant or unoccupied, or not in use, unless agreed to by this corporation in

writing upon this policy, from thenceforth, so long as the same shall be vacant, or unoccupied, or not in use, or the hazard otherwise increased, or if it be a manufacturing establishment, running in whole or in part over or extra time, or running at night, without special agreement endorsed on this policy, this policy shall be of no force or effect. And it is moreover agreed and declared that this insurance is not intended to apply to or cover any books of account, written securities, deeds, or other evidences of title to property; nor to bonds, bills, notes, or other evidences of debt; nor to money or bullion; and that casts, curiosities, engravings, jewelry, jewels, medals, models, musical and scientific instruments, (piano-fortes in dwelling-houses excepted,) paintings, patterns, plate, precious stones, printed music, prints, sculptures, statuary, and watches are not deemed to be included in any insurance unless particularly specified in writing in the policy.

1. Applications for insurance on property must be in writing, and must specify the construction and materials of the building to be insured, or containing the property to be insured; by whom occupied; whether as a private dwelling, or how otherwise; its situation with respect to contiguous buildings, and their construction and materials; and whether any manufacturing is carried on within or about it; and in relation to the insurance of goods and merchandise, the application must state whether or not they are of the description denominated hazardous, extra hazardous, or specially hazardous, and such survey and description shall be taken and deemed to be a part and portion of the policy issued thereon, and a warranty on the part of the insured.

2. If any person effecting insurance in this company shall make any misrepresentation or concealment touching the risk to be assumed, or if, during the existence of this policy, or any renewal thereof, the risk shall be increased by any means, or by the occupation of the premises for more hazardous purposes than are permitted by this policy, or if the insured, at or before the taking of any renewal, shall fail to notify the company of any increase of the hazard, whether within or without the premises, and have the same endorsed hereon, this policy shall be void. Every renewal shall be deemed to be made upon the faith of the representation on which the original policy was granted, unless superceded by a new description of the risk.

3. This insurance may be terminated at any time, at the request of the insured, in which case the company may retain the customary short rates for the time the policy has been in force. The insurance may also be at any time terminated at the option of the company, on giving notice to that effect, and refunding a ratable portion of premium for the unexpired term of the policy.

4. If the property to be insured be held in trust or on commission, or be a leasehold or other interest not absolute, it must be so represented to the company, and expressed in the policy in writing, otherwise the insurance as to such property shall be void; and in case of loss the names of the respective owners shall be set forth in the preliminary proofs of such loss, with their respective interests.

The clause "held in trust or on commission, or sold but not delivered," covers only property of the assured, or upon property which the same has an interest in for commission, advances, or other charges, (and if for commission, advances, or other charges, only to the extent of the same,) or upon property held for others, which the assured has agreed in writing to protect by insurance, and is responsible for the same, or for property that has been duly entered upon the book or books of the assured, in the name of a purchaser and not delivered.

Goods held on storage must be separately and specifically insured.

5. No insurance, whether original or continued, shall be considered as binding until the actual payment of the premium.

6. Re-insurance for any other insurance company to be on the basis of joint liability with said company; and in the event of loss this company to pay *pro rata* at and in the same time and manner as the company re-insured. If claim shall be made against this company by a mortgagee holding this policy as collateral security, and this company shall pay the same and claim that as to the mortgagor or owner no liability existed, this company shall at once be legally subrogated to all the rights of the mortgagee under all the securities held as collateral to the mortgage debt to the extent of such payment, or, at its option, may pay the mortgagee the whole principal due or to become due on the mortgage with interest, and shall therefrom receive a full assignment and transfer of the same, and all other securities held as collateral to the mortgage debt.

And whenever this company shall pay any loss, the assured agrees to assign over all his rights to recover satisfaction therefor from any other person or persons, town, or other corporation, or to prosecute therefor at the charge and for the account of company if requested.

7. In case of claim for loss or damage on a policy assigned, where there is no actual sale or transfer of the property insured, proofs of loss shall be made by the insured, in conformity with the conditions of this policy, in like manner as if no assignment had been made; otherwise this policy shall be void and of no force or effect whatever, and all liability on the part of this company shall cease.

8. In case of fire or loss or damage thereby, or of exposure to loss or damage thereby, it shall be the duty of the insured to use their best endeavors for saving and preserving the property; and if they should fail to do so, this company shall not be held liable to make good the loss and damage sustained in consequence of such neglect; and it is mutually understood that there can be no abandonment to the insurers of the subject insured.

9. Persons sustaining loss or damage by fire shall forthwith give notice thereof in writing to the company or its agent, and, as soon after as possible, they shall deliver as particular an account of their loss and damage as the nature of the case will admit, signed with their own hands, and they shall accompany the same with their oath or affirmation, declaring the said account to be true and just; showing also the ownership of the property insured, what other insurance, if any, existed on the same property, and give a copy of the written portion of the policy of each company; what was the whole cash value of the subject insured; what was their interest therein; in what manner (as to trade, manufactory, merchandise, or otherwise) the building insured or containing the subject insured, and the several parts thereof, were occupied at the time of the loss, and who were the occupants of such building; and when and how the fire originated, so far as they know or believe; they shall also produce a certificate under the hand and seal of a magistrate, notary public, or commissioner of deeds, most contiguous to the place of the fire, and not concerned in the loss as a creditor or otherwise, or related to the insured or sufferers, stating that he has examined the circumstances attending the fire, loss or damage alleged; that he is acquainted with the character and circumstances of the insured or claimant, and that he verily believes that he, she, or they have, by misfortune, and without fraud or evil practice, sustained loss or damage on the subject insured to the amount which such magistrate, notary pub-

lic, or commissioner of deeds shall certify. The assured shall, if required, submit to an examination or examinations under oath by any person appointed by the company, and subscribe to such examination when reduced to writing.

When merchandise or other personal property is partially damaged, the assured shall forthwith cause it to be put in as good order as the nature of the case will admit, assorting and arranging the various articles according to their kind; separating the damaged from the undamaged, and shall cause a list or inventory to be made and furnished to the company of the whole, naming the quantity and cost of each article. In case differences shall arise concerning the amount of loss, the amount of sound value and of damage shall then be ascertained by the examination and appraisal of each article by two appraisers, one to be chosen by the company and one by the claimant or claimants, and if necessary, these two to select a third person, (one-half the appraisers' fees to be paid by the insured,) and the award of any two in writing shall be binding on both the company and the insured; but such award shall not determine any question as to the liability of this company under this policy, its binding effect being only so far as regards the actual cash value of, or damage or loss to, such property in question, and the assured shall, if required, submit to an examination under oath, by the agent or attorney of the company, and answer all questions touching his, her, or their knowledge of anything relating to such loss or damage, or to their claim thereupon, and subscribe such examination, the same being reduced to writing; and, whenever required in writing, the insured or person claiming shall produce and exhibit his books of account and other vouchers to the insurers or their agent, at the office of this company, in support of his claim, and permit extracts and copies thereof to be made; and shall also produce certified copies of any bills or invoices of property destroyed or damaged, the originals of which may have been lost, mislaid, or destroyed; and shall also exhibit to any persons named by the company, and shall permit to be examined by them, any property damaged on which any loss is claimed, or any property saved which was insured by this policy; and until such proofs, declarations, and certificates are produced, and such appraisals and examination of property permitted by the claimant, the loss shall not be payable.

All fraud or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture of all claim on this company under this policy.

10. In case of any loss on or damage to the property insured, it shall be optional with the company to replace the articles lost or damaged with others of the same kind and quality, or to take the goods at their appraised value, or to rebuild or repair the building or buildings within a reasonable time, giving notice of their intention so to do within thirty days after having received the preliminary proofs of loss required by the ninth article of these conditions; and the assured shall, if required, furnish plans and specifications of the building or other property destroyed.

The cash value of property destroyed or damaged by fire shall in no case exceed what would be the cost to the assured, at the time of the fire, of replacing the same; and in case of the depreciation of such property, from use or otherwise, a suitable deduction from the cash cost of replacing shall be made to ascertain the actual cash value.

11. This company will not be answerable for any loss arising from the use of fires in buildings unprovided with a good and substantial stone or brick chimney, or in consequence of neglect of or deviation from the

laws or regulations of police made to prevent accidents from fire, in places where laws and regulations on this subject exist.

12. It is furthermore hereby expressly provided that no suit or action of any kind against this company, for the recovery of any claim upon, under, or by virtue of this policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of twelve months next after such loss or damage shall occur; and in case any such suit or action shall be commenced against said company after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim thereby so attempted to be enforced.

13. This insurance (the risk not being changed) may be continued for such further time as shall be agreed on, provided the premium therefor is paid and endorsed on this policy or a receipt given for the same, and it shall be considered as continued under the original representation, and for the original amounts and divisions, unless otherwise specified in writing; but in case there shall have been any change in the risk, either within itself or by neighboring buildings, not made known to the company by the assured at the time of renewal, this policy and the renewal shall be void.

14. It is further understood and made part of this contract, that the agent of this company has no authority to waive, modify, or strike from this policy any of its printed conditions, nor is his assent to an increase of risk binding upon the company, until the same be endorsed, in writing, on the policy, and the increased premium paid; nor, in the event that this policy shall become void by reason of any of the conditions thereof, shall the agent have power to revive the same, except by issuing a new policy; and any policy so made void shall remain void and of no effect until revived by the actual issue and delivery to the assured of the new policy, any contract by parole or understanding with the agent to the contrary notwithstanding.

☞ Dry goods in windows where lights are used are not covered by this policy, unless a specific amount is stated to apply thereto.

☞ CARPENTER'S OR BUILDER'S RISK.—When buildings insured by this company are being altered or repaired, or when mechanics are working thereon, or if the buildings contain property insured by this company, notice thereof must be given to the company, and consent thereto endorsed on the policy.

☞ Plate-glass doors or windows, when the plates are of the dimensions of three square feet or more, are subject to an extra premium, and must be separately and specifically insured, otherwise they are not covered by this policy.

☞ Petroleum, rock, earth, coal, kerosene, or carbon oils of any description, whether crude or refined, or products thereof; benzine, benzole, naphtha, camphene, spirit gas, burning-fluid, turpentine, phosgene, or any other inflammable liquid, are not to be stored, used, kept, or allowed on the above premises, temporarily or permanently, for sale or otherwise, unless with written permission endorsed on this policy, excepting the use of refined coal, kerosene, or other carbon oil for lights, if the same is drawn and the lamps are filled by daylight. Otherwise the policy shall be null and void.

☞ GAS.—The generating or evaporating within the building or contiguous thereto of any of the foregoing substances for a burning gas, or the use of gasoline for lighting, is prohibited under this policy, unless permitted in writing hereon.

☞ Gunpowder, or any other articles subject to legal restrictions, it is understood and agreed are subject to the same restrictions, prohibitions, limitations, and conditions under this policy as the articles mentioned in the section next preceding this.

☞ Fences, privies, and other yard fixtures, also store furniture and fixtures, must be separately and specifically insured, otherwise they are not protected by this policy.

☞ If any property covered by this insurance is damaged by lightning, this company shall not be liable therefor unless fire ensues, and then for loss by fire only, which shall be determined by the value of the damaged property after the casualty by lightning. If the premises or vessel insured, or containing the subject insured, be damaged or destroyed by the bursting of a boiler, or by explosion from any cause, or if the building insured or containing the subject insured shall fall, from other causes than fire, the policy shall be null and void the instant the casualty by explosion or falling occurs.

In witness whereof, the Phenix Insurance Company have caused these presents to be signed by their president and attested by their secretary in the city of Brooklyn, N. Y., county of Kings. But this policy shall not be valid until countersigned by the authorized agent of the said Phenix Insurance Company, at Savannah, Ga.

STEPHEN CROWELL,
President.

(Sig'd) WM. C. COSENS,
Agent.

PHILANDER SHAW,
Secretary.

Countersigned at Savannah this first day of March, 1872.

CLASSES OF HAZARDS.

This classification refers to buildings and their contents.

FIRST CLASS.

Not hazardous.—Dwelling-houses and household furniture in dwelling-houses, staple, foreign, and domestic dry goods in packages.

Hazardous.—Agricultural implements; belting and car-springs of India rubber or gutta-percha; boots and shoes; card printing; china or earthenware or glassware in boxes, crates, or casks; copper and sheet-iron ware; dry goods, including cotton batts and wadding; embroideries and laces; flour; furs and peltries in packages; glass (window or plate, or looking-glasses) in boxes; grocers' stock; gum shellac; gutta-percha and India rubber unmanufactured; hides and leather; hops in bales; indigo; iron ware; metals in bars, rods, pigs, and sheets; oil, (fish and vegetable;) paints; paper in reams; pot, pearl, and soda ash; provisions; rice; straw braid and straw hats in packages, as imported; sail making; spirituous liquors in casks and in glass packages; sugar; sulphur; threshed grain; tailors' goods and ready-made clothing; tallow; whalebone; wine in casks and in glass, in packages; wool.

Extra hazardous.—Alcohol in bbls; apothecaries' stocks, (retail only;) artificial flowers and feathers; basket-sellers' stocks; bakeries with ovens outside the building and using coal; basket-bleaching; basket-making; blacksmith's shops; block and pump making; box-repairing workshops; brass turning and working; also stock, of books; china or

earthen or glass ware, or looking-glasses, with privilege of packing and unpacking; coffee; colormen's stock; china or glass or earthen ware, or window or plate glass or looking-glasses, unpacked; cabinet-ware; confectionery; carriages; carving; chocolate making; coopering; copper-plate printing; drugs, (importers' stocks of, without inflammable acids or phosphorus;) daguerreotype materials; daguerreotyping; essential oils; eating-houses; electro-plating; fire-crackers in packages; flax; flocks; fishing-tackle; furs, unpacked; feathers; fringe-making by hand-power; gum copal; gas-fixtures; gas fitting; gilding; gold-pen making; gun repairing; hay and straw pressed in bundles; hardware and cutlery; hat-ironing; hat-bleaching; hemp; India-rubber and gutta-percha goods; India-rubber hard goods; jewelry; jewelry manufacturing; lime unslacked in lime-stores; liquors and wine in glass, unpacked; lamps; lamp-manufacturing; liquor-bottling establishments; lithographing; matches, stocks of, on sale; musical instruments and printed music; millinery; military goods; map mounting and varnishing; morocco manufacturing; manilla and sisal grass and tow; oakum in bales; oiled clothing; optical and mathematical instruments; painters' stock; pitch; pins and needles; paper-hangings; porter-houses; percussion-caps; pictures and prints; precious stones; paper boxes and band-boxes; perfumery; pocket-books; plumbing and pewtering; printing of newspapers and engravings, by hand-power only; provision-warehouses, with brick smoke-houses attached; photographing; private stables; rags in packages; rosin and rosin oil; ship chandlery; spirits of turpentine; salt; spices; silver plate and plated ware; straw goods; segars in stores and manufactories; stationery; silversmithing; teas; tar; toys; tin or sheet iron or copper working; taverns; tobacco; umbrella manufacturing; upholstery; varnish, (excepting naphtha or benzine varnish;) vessels in port, their cargoes, and vessels building and repairing; wood and willow ware; watches; watchmakers' tools.

Specially hazardous.—Cotton in bales; cotton brokers' samples; and all trades, occupations, and hazards not above enumerated, are classed specially hazardous.

☞ Dry goods in windows where lights are used are not covered by this policy, unless a specific amount is stated to apply thereto.

The Phenix Insurance Company hereby consent that the interest of in the within policy be assigned to subject, nevertheless, to all the conditions therein contained.

New York, , 187 .

Signed in behalf of the company.

——— ———.

For value received, hereby transfer, assign, and set over unto and assigns, all title and interest to this policy, and all advantages to be derived therefrom.

Witness hand and seal, this day of , 187 .

Sealed and delivered in the presence of

——— ———. [L. S.]

THE PHENIX INSURANCE COMPANY, BROOKLYN, N. Y.

Incorporated 1853.

Offices: 173 Broadway, New York, and Phenix Insurance Building, Court street, opposite City Hall, Brooklyn.

Cash capital one million dollars, with a large surplus.

Insures against loss by fire dwelling-houses, manufactories, ware-

houses, merchandise, personal estate, and upon the hulls and cargoes of vessels while in port. Ocean marine risks taken, and policies issued on the same only at the New York office, where all applications on such risks are to be sent.

DIRECTORS.

Stephen Crowell,	Nathan T. Beers,	William B. Kendall,
Andrew V. Stout,	Augustus Studwell,	James H. Elmore,
J. D. Ingersoll,	Gilbert Sayers,	Erastus S. Brown,
John M. Hicks,	Jeremiah V. Spader,	A. B. England,
Henry Collins,	Wm. M. Vail,	Edwin Beers,
Isaac H. Frothingham,	Harvey E. Hicks,	Nathaniel Putnam,
Daniel F. Fernald,	Samuel W. Burtis,	Daniel H. Gregory,
Geo. W. Bergen,	Edwin T. Rice,	Rufus R. Graves,
Charles C. Betts,	Edgar W. Crowell,	E. L. Roberts,
James S. Rockwell,	Harold Dollner,	Austin Corbin,
Chauncey Bedell,	Isaac Brinkerhoff,	C. S. Woodhull,
Alvin C. Bradley,	William P. Beale,	Robert Hampson.
Ezra Baldwin,	Thos. H. Rodman,	

STEPHEN CROWELL, *President.*
CHAUNCEY BEDELL, *Vice-President.*
PHILANDER SHAW, *Secretary.*

Receipt for cancellation.

———, 187 .

Received of the Phenix Insurance Company dollars, return premium, in consideration of which this policy is hereby cancelled and surrendered to the company.

(Indorsed:) Expires 1st day of March, 1873. Premises, Congress st. No. 310. Phenix Insurance Company; capital $1,000,000. W. H. Lanier & Co.; amount insured, $2,500; premium, $22.50, Offices, 173 Broadway, New York; Phenix ins. building, Court st., opp. City Hall, Brooklyn. Register ; edition June, 1873.

4 (Indorsement on petition:)
Due and legal service acknowledged; copy, process, and time of filing waived.

W. C. COSENS, *Agent.*

August 27th, 1872.
Filed Dec'r 23d, 1872.

W'M J. CLEMENTS,
Clerk S. C. C. C.

Defendant's plea.

THE PHŒNIX INSURANCE COMPANY *ats.* W. H. LANIER & CO. } Case. In the sup. court Chat. Co.

And now comes the said defendant, by its attorney, S. Yates Levy, and defends the wrong and injury when, &c., and, for answer, says that it is not indebted in manner and form as the said plaintiffs have above thereof complained against it, and of this it puts itself upon the country, &c.

S. YATES LEVY,
Def't's Att'y.

GEORGIA, *Chatham County:*

Personally appeared William C. Cosens, the duly-authorized agent and official of The Phœnix Insurance Company, who, being duly sworn, makes oath, and saith that the facts set forth in the foregoing plea are true in substance.

W'M C. COSENS, *Agent.*

Sworn to and subscribed before me May 8th, 1873.

JOHN W. BURROUGHS,
Not. Pub. Chat. County, G'a.

(Indorsed:) Filed May 9th, 1873. Z. N. Winkler, dep. cl'k S. C. C. C.

5 *Petition to remove case to U. S. court.*

In the superior court of Chatham County, May term, 1873.

GEORGIA, *Chatham County:*

W. H. LANIER & CO.
vs.
THE PHŒNIX INSURANCE COMPANY OF BROOKLYN, N. Y. } Assumpsit.

To the honorable the superior court of said county:

The petition of The Phœnix Insurance Company of Brooklyn, New York, a corporation created under and by virtue of the laws of the State of New York, respectfully shows that your petitioner is the defendant in this suit, and that the same was brought by William M. Lanier and William H. Lanier, copartners, using the firm name and style of W. H. Lanier and Company, plaintiffs, on or about the twenty-seventh day of August, 1872, in the superior court of Chatham, county aforesaid, to the January term, 1873, thereof, and that the said plaintiffs are, and were at the time of bringing this suit, citizens of the State of Georgia, and residing in the southern district thereof, and that your petitioner is, and was at the time of bringing this suit, a corporation duly chartered under and by virtue of the laws of the State of New York, and residing and having its chief place of business in the city of Brooklyn, in the State of New York aforesaid.

And your petitioner further respectfully shows that there is, and was at the time this suit was brought, a controversy therein between citi-

6 zens of the State of Georgia, residing in the southern district thereof, to wit, the said William M. Lanier and William H. Lanier, copartners as aforesaid, plaintiffs in the said suit, and a resident and citizen of the State of New York, to wit, your petitioner, the defendant herein. And further, that the said plaintiffs claim in their petition or declaration in this suit, as damages against your petitioner, the sum of twenty-five hundred dollars, besides interest, and that the matters in dispute in this suit therefore exceeds the sum of five hundred dollars, exclusive of costs.

And your petitioner further respectfully represents that this suit has not yet been tried, but that the same is pending for trial in Savannah, in Chatham County aforesaid, in the superior court thereof, and that your petitioner desires to remove this suit, before the trial thereof, into the next circuit court of the United States, to be held in the southern district of Georgia, in the fifth circuit, in pursuance of the provisions of

law, as contained in the act of Congress approved July twenty-seventh, one thousand eight hundred and sixty-six, entitled "An act for the removal of causes, in certain cases, from State courts," as amended by the act of Congress approved March second, one thousand eight hundred and sixty-seven, entitled "An act to amend an act entitled 'An act for the removal of causes, in certain cases, from State courts,'" approved July twenty-seventh, eighteen hundred and sixty-six. And your petitioner is ready and willing to give such good and sufficient surety as this court may direct, for its doing all acts and things required to be done by the said provisions of law upon the removal of a
7 suit into the United States courts, and it offers herewith its bond, executed by Thomas H. Harden, of the city of Savannah, in said southern district of Georgia, as surety in the penal sum of five thousand dollars, conditioned that your petitioner shall enter in the next circuit court of the United States to be held in and for the southern district of Georgia, in the fifth circuit, on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings in this suit, and doing such other appropriate acts as by the said acts of Congress are required to be done upon the removal of a suit into the United States court, as good and sufficient surety according to the said provisions of law upon the removal of a suit into the United States court. And your petitioner therefore prays that the said bond may be accepted as good and sufficient surety, according to the said provisions of law, and that the said suit may be removed into the next circuit court of the United States, to be held in and for the southern district of Georgia, in the fifth circuit, pursuant to the statute of the United States in such case made and provided, and that no further proceedings may be had therein in this court.

And your petitioner will ever pray, &c.

[SEAL.] The Phœnix Insurance Company of Brooklyn, N. Y.,
By STEPHEN CROWELL,
President.

S. YATES LEVY,
Att'y for Petitioner.

8 STATE OF NEW YORK,
County of New York:

Before me, Francis P. Burke, a commissioner for the State of Georgia in and for the State of New York, duly appointed, commissioned, and sworn, and resident in the city of New York, in said State of New York, personally came and appeared Stephen Crowell, president of the Phœnix Insurance Company, of Brooklyn, New York, the petitioner in the foregoing petition, who, being duly sworn, deposes and says that he has read the foregoing petition, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true; and further saith not.

STEPHEN CROWELL.

Subscribed and sworn to this sixteenth day of June, 1873, before me.

[SEAL.] FRANCIS P. BURKE,
Commissioner for the State of Georgia in and for the State of New York.

(Indorsed:) Filed June 27th, 1873. W. J. Clements, clerk S. C. C. C.

Affidavit to remove case.

STATE OF NEW YORK,
County of New York:

W. H. LANIER & CO.
vs.
THE PHŒNIX INSURANCE COMPANY, OF Brooklyn, N. Y.

} Action on policy of insurance, in the superior court of Chatham County, Georgia.

Before me, Francis P. Burke, a commissioner for the State of
9 Georgia in and for the State of New York, duly appointed, commissioned, and sworn, and residing in the city of New York, in said State of New York, personally appeared Stephen Crowell, who, being duly sworn, makes oath and saith that he is a citizen of the State of New York, and resides at Brooklyn, in said State; that he is the president of the Phœnix Insurance Company, of Brooklyn, New York, a corporation duly created under and by virtue of the laws of the State of New York, and having its residence therein, which said corporation is the defendant in the above-entitled action; that the same was brought, on or about the twenty-seventh day of August, 1872, in the superior court of Chatham County, State of Georgia. And this deponent further says that he has reason to believe, and does believe, that, from prejudice and local influence, the said The Phœnix Insurance Company, of Brooklyn, New York, of which he is the president as aforesaid, will not be able to obtain justice in said court, and therefore he makes this affidavit for the purpose of removing said suit into the circuit court of the United States for the southern district of Georgia, in the fifth circuit, in pursuance of the statute in such case made and provided; and further saith not.

STEPHEN CROWELL.

Subscribed and sworn to before me this seventeenth day of June, 1873.
[SEAL.] FRANCIS P. BURKE, [SEAL.]
Commissioner for the State of Georgia in and for the State of New York.

(Indorsed:) Filed June 27th, 1873. Wm. J. Clements, clerk S. C. C. C.

10 *Bond for removal of case to U. S. court.*

W. H. LANIER AND WILLIAM M. LANIER, copartners using the firm name and style of W. H. Lanier and Company,
vs.
THE PHŒNIX INSURANCE COMPANY OF Brooklyn, New York.

} Action on policy of insurance in the superior court of Chatham County, Georgia.

We, The Phœnix Insurance Company, of Brooklyn, New York, principal, and Thomas H. Harden, of Savannah, in the State of Georgia, as surety, are held and firmly bound unto William H. Lanier and William M. Lanier, copartners under the firm name and style of W. H. Lanier and Company, of Savannah aforesaid, in the sum of five thousand dollars, lawful money of the United States of America, to be paid to the said William H. Lanier and William M. Lanier, copartners as aforesaid, and the survivor of them, their and his heirs, executors, administrators,

and assigns, for which payment well and truly to be made, the said company binds itself and the said surety binds himself, his heirs, executors, and administrators, firmly by these presents, sealed with the corporate seal of said company, and signed by the hand of its president, and signed and sealed by the said surety, dated the sixteenth day of June, anno Domini eighteen hundred and seventy-three.

Whereas a suit was brought on or about the twenty-seventh
11 day of August, one thousand eight hundred and seventy-two, in the superior court of Chatham County, Georgia, by the said W. H. Lanier and Company against the said The Phœnix Insurance Company of Brooklyn, New York, and the same is now pending for trial in Savannah, in Chatham County aforesaid, and is removable into the circuit court of the United States for the southern district of Georgia, in the fifth circuit, under the act of Congress approved July twenty-seventh, eighteen hundred and sixty-six, entitled "An act for the removal of causes in certain cases from State courts, approved July twenty-seventh, eighteen hundred and sixty-six;" And whereas the said The Phœnix Insurance Company of Brooklyn, New York, has made (through its president) and filed in the said the superior court of Chatham County, Georgia, aforesaid, the affidavit required by the said amendatory act, and has filed its petition in the said the superior court of Chatham County, for the removal of said suit into the said next circuit court of the United States, to be held in and for the southern district of Georgia:

Now, therefore, the condition of the above obligation is such, that if the above bounden The Phœnix Insurance Company of Brooklyn, New York, or its legal representatives, shall enter, or cause to be entered, in the fifth circuit court of the United States in and for the southern district of Georgia, on the first day of its stated session next ensuing
12 after the order of the said superior court of Chatham County aforesaid for the removal of said suit into said circuit court, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and do and cause to be done such other appropriate acts as by the said act of Congress, approved July twenty-seventh, eighteen hundred and sixty-six, and the said other act amendatory thereof, are required to be done upon the removal of a suit into the United States court, then the above obligation to be void; otherwise to remain in full force and virtue.

The Phœnix Insurance Company of Brooklyn, New York,
By STEPHEN CROWELL, [SEAL.]
President.
THOS. H. HARDEN. [L. S.]

Witness to signature of Thos. H. Harden:
C. D. C. RHIND, [L. S.]
Not. Public, C. C.

STATE OF NEW YORK,
County of New York:

Before me, Francis P. Burke, a commissioner for the State of Georgia in and for the State of New York, duly appointed, commissioned, and sworn, and residing in the city of New York, in said State of New York, personally appeared Stephen Crowell, who, being duly sworn, makes oath and saith that he is the president of The Phœnix Insurance Company of Brooklyn, New York; that the said company executed
13 the foregoing instrument by its corporate seal, and through him, deponent, as its president, and that it executed the same as afore-

said as its own free act and deed, for the uses and purposes therein mentioned.

[SEAL.] FRANCIS P. BURKE,
Commissioner for the State of Georgia, in and for the State of New York.

Dated June 16th, 1873.

(Indorsed:) Filed June 27th, 1873. W. J. Clements, cl'k S. C. C. C.

Order for removal of case.

Superior court, Chatham County, May term, 1873.

W. H. LANIER & Co.
vs.
THE PHŒNIX INSURANCE COMPANY of Brooklyn, N. Y. } Action on policy of insurance.

Upon reading and filing the petition of the above-named The Phœnix Insurance Company, of Brooklyn, New York, defendant herein, for the removal of this suit into the circuit court of the United States for the southern district of Georgia, in the fifth circuit, in pursuance of the laws of the United States relating to the removal of suits from the State courts, and upon filing the security offered by said defendant, according to the requirement of said laws, and on motion of S. Yates Levy, attorney for the said defendant, it is hereby ordered that the said security be accepted, and the said suit be removed into the next circuit court of the United States, to be held in the said southern district of Georgia, and that no further proceedings be had in said suit in this court.

W. SCHLEY,
Judge Sup. C't, East. C'rc't, Ga.

This July 3d, 1873.

(Indorsed:) Filed July 3d, 1873. W. J. Clements, clerk S. C. C. C.

14 *Certificate of clerk of superior court, Chatham County, Georgia.*

STATE OF GEORGIA,
Chatham County:

CLERK'S OFFICE, SUPERIOR COURT.

I, William J. Clements, clerk of said superior court, do hereby certify that the foregoing twenty-nine pages of writing contain a true, correct, and exact copy of the original proceedings in the case of W. H. Lanier & Co. vs. The Phœnix Insurance Company of Brooklyn, New York, as appears of file and record in this office.

In testimony of which I have hereunto set my official signature and the seal of said superior court, at Savannah, Georgia, this thirteenth day of July, eighteen hundred and seventy-three.

[SEAL.] WM. J. CLEMENTS,
Clerk S. C. C. C.

Certificate of judge of superior court, Chatham County, Georgia.

I, William Schley, presiding judge of the superior court of Chatham County, Georgia, a court of highest original jurisdiction, and one of the courts of the eastern circuit of Georgia, do hereby certify that William

J. Clements, whose name is subscribed to the preceding exemplification, is the clerk of the said superior court of Chatham County, duly elected and sworn, and that full faith and credit are due to his official
15 acts. I further certify that the seal affixed to the exemplification is the seal of our said superior court, and that the attestation thereof is in due form.

W. SCHLEY,
Judge Sup'r Court Eas. C'rc't, Ga.

STATE OF GEORGIA,
City of Savannah, County of Chatham:

I, William J. Clements, clerk of the superior court of Chatham County, State of Georgia, do hereby certify that Hon. William Schley, whose name is subscribed to the preceding certificate, is the presiding judge of the superior court of Chatham County, and of the courts of the eastern circuit of Georgia, duly commissioned and sworn, and that the signature of said judge to said certificate is genuine.

In testimony whereof I have hereunto .set my hand and affixed the seal of said court, this 13th July, 1873.

[SEAL.] WM. J. CLEMENTS,
Clerk S. C. C. C.

16 And afterwards, to wit, on the twenty-seventh day of March, A. D. eighteen hundred and seventy-four, the following certified record of testimony of J. Gadsden King and Charles Perry, witnesses for the plaintiffs, was filed in the clerk's office of the fifth circuit court of the United States for the southern district of Georgia.

Testimony of J. Gadsden King and Charles Perry.

In Chatham superior court.

W. H. LANIER & Co.
vs.
THE PHŒNIX INSURANCE COMPANY. } Statutory action on policy of insurance.

Interrogatories to be propounded to J. Gadsden King, a material witness for the plaintiffs, and who resides in the city of Atlanta, in the county of Fulton, in this State.

Interrogatory first. Do you know the parties?

Interrogatory second. Had you any business engagements with and for the defendant, The Phœnix Insurance Company, about the 1st of March, 1872; if so, what?

Interrogatory third. What was the business of the plaintiffs, W. H. Lamer & Co., on and about 1st of March, 1872, and what were your means of knowing what their business was?

Interrogatory fourth. Do you know anything of the circumstances under which any insurance was effected for them? Who solicited them, and for what company? State all the particulars fully.

17 Interrogatory fifth. If you answer to any of the foregoing interrogatories that insurance was effected for the plaintiffs in the defendant's company, please state what was known at the time as to the keeping of kerosene oil by the plaintiffs. State all that you knew of it before, at the time, and after the policy was made out, and what any other agent of the company knew about it.

Interrogatory sixth. Have you any idea of the quantity and value of plaintiff's stock in trade at the time of the insurance, or at the time of the fire? If so, please state it.

Interrogatory seventh. State all you know that will benefit the plaintiffs.

RUFUS E. LESTER,
Pl'ffs' Att'y.

Defendant, objecting to the fifth and sixth interrogatories, as not producing the best testimony as to the facts sought to be proved, propounds the following cross-interrogatories:

First cross-interrogatory. Did the defendant, at the time of the effecting of the insurance, (if any was effected,) give plaintiffs any written permission to keep kerosene, or any other explosive or inflammable oil, on the premises, for sale or otherwise?

Second cross-interrogatory. Did you, or any other representing legally the defendant, give any such written permission? If yes, what power from defendant had you to do so? Was your power in writing?
18 If yes, attach such written power, or a true copy thereof, to your answers.

Third cross-interrogatory. If you gave any such permission, written or verbal, did you communicate your action on that point to defendant? If yes, when and how?

Fourth cross-interrogatory. Did you make, or cause to be made, any special examination of the quantity or value of plaintiffs' stock; or did they furnish you with any inventory or valuation of the same at the time the insurance (if any) was effected?

Fifth cross-interrogatory. State anything you know that can benefit defendant's case, as particularly as though interrogated thereto.

S. YATES LEVY,
Def't's Att'y.

Answers.

In Chatham sup'r court.

Action on policy, &c.

GEORGIA, *Cobb County:*

By virtue of authority given by the parties in the above case, commission being waived, &c., we have caused Gadsden King, the witness named in the interrogatories annexed, to come before us, and after being sworn the truth to say in answer to the interrogatories, answers as follows:

To 1st interrogatory he answers, he knows parties.

To 2d interrogatory he answers, he was solicitor for insurance for their agent, in March, 1872.

To 3d interrogatory, considered business of plaintiffs merchants,
19 keeping general and mixed stock, about 1st March, 1872; and he knows it by being in their store often, and buying goods from them.

To 4th interrogatory he answers he does know that an insurance was effected by them through witness' solicitation for W. C. Cosens, agent for the Phœnix Insurance Company of Brooklyn, N. Y. That, at that time, plaintiffs had another insurance in another office or company, but don't now remember the exact amount.

To 5th interrogatory he answers: At the time of taking the application and writing the policy nothing was known about keeping kerosene oil, but when witness delivered the policy to Mr. Lanier, pl'ff, and collected the premium, Lanier told witness that he wished permission to keep a barrel of kerosene oil, whereupon witness immediately went to the agent's office and inquired of his book-keeper and assistant, Mr. Philput, if such permission would be granted. The reply was, "Yes," that it was granted, and that if Mr. Lanier desired it that he would indorse it upon the policy, but that permission being given he did not think it necessary to so indorse it. Upon witness' informing Mr. Lanier, plaintiff, of this fact he said, since permission was granted he would not make the trouble of endorsement.

To 6th interrogatory he answers: Witness' idea of plaintiffs' stock was derived from plaintiffs' statement, made at the time of the
20 taking of the insurance, who represented it as being about $2,000 in excess of this and all other insurance then running, which statement witness did the more readily believe from repeated observation when in his store of the amount of stock therein contained.

To 7th interrogatory witness answers nothing more.

Cross-answers:

To 1st cross-interrogatory he answers that witness gave no other permission except the one mentioned in answer to 5th direct interrogatory—none written.

To the 2d cross-interrogatory he answers he gave no written permission but simply verbal, as before stated.

To 3d cross-interrogatory he answers: Witness gave the verbal permission as stated above and immediately communicated the fact to Mr. Cosens, or his representative at his office.

To the 4th cross-interrogatory he answers: Witness did not make, or cause to be made, any examination of plaintiffs' stock. Plaintiffs gave him, witness, a valuation at the time of effecting the insurance, which valuation witness believed to be correct, from the amount of goods and stock that he saw.

To 5th cross-interrogatory he answers he knows nothing more, &c.

J. GADSDEN KING.

Answered, sworn to, and subscribed before us this 25th Aug., 1873.

A. W. SIMPSON, *Com'r.* [L. S.]
EDWIN L. LITCHFIELD, *Commissioner.* [L. S.]

(Indorsed:) Filed Aug. 26, 1873. W. J. Clements, clerk S. C. C. C.

21 *Notice to take testimony of Charles Perry.*

Chatham superior court.

W. H. LANIER & Co. *vs.* THE PHŒNIX INSURANCE COMPANY. } Statutory action on policy of insurance.

To the Phœnix Insurance Company, S. Yates Levy, attorney, &c.:

Take notice that on Wednesday next, the 11th instant, at 12 o'clock m., at the law-office of J. R. Saussy, esq., on Bay street, in the city of Savannah, the plaintiffs will take the testimony of Charles Perry, a witness for the plaintiffs, before J. R. Saussy, esq., commissioner appointed by the superior court of Chatham County, under the provisions

of the act of the legislature, entitled "An act to provide for the taking of testimony by written deposition in certain cases not now allowed by law," approved December 12th, 1871.

RUFUS E. LESTER,
Plaintiffs' Attorney.

(Indorsed:)
Service acknowledged June 5, 1873.

S. YATES LEVY,
For Defendant.

In the superior court of Chatham County, Georgia.

W. H. LANIER & CO.
vs.
THE PHŒNIX INSURANCE COMPANY OF BROOKLYN.

Depositions of Charles Perry, a witness for the plaintiffs in the above case, taken upon notice, beginning on the 11th day of June, 1873, at Savannah, in the presence of the attorneys of the plaintiffs and defendant.

22

The said witness, being duly sworn, deposes as follows:

Direct testimony.

Know the plaintiffs. They did business in the city of Savannah, on Congress street, between Barnard and Jefferson streets. Their business was groceries and a general country business, with an assorted stock of dry goods, notions, etc. A fire occurred in the store of plaintiffs in the month of April or May, 1872. They were burned out by that fire. I was in there frequently during the winter immediately preceding the fire, once or twice a week up to the time of the fire, and have only a general idea of what the stock was worth; was in the store the morning before the fire, and saw that they were receiving fresh goods. The store appeared to be pretty full of goods, on one side dry goods principally, and the other side groceries and assorted goods. According to my idea there was between four thousand and five thousand dollars' worth of goods in the store at that time. I have had some experience in country stores. Some weeks before the fire I was in the store of plaintiffs, and was present at a conversation between the plaintiffs and an insurance agent. The agent was Mr. King. I heard him talking about several insurance companies. I don't know what company he represented; supposed it was an English company mentioned. I don't know his full name. He was introduced to me as Mr. King, of Charleston, a fine-looking, portly gentleman. He was soliciting insurance, and set forth the necessity of insuring their whole stock.

23

Question. What did plaintiffs say was the amount of their insurance on their stock at that time, in their conversation with this insurance agent, Mr. King?

(Objected to by def't's attorney, unless the insurance agent, Mr. King, is connected with the defendant, and any statements of Mr. King's objected to, also.)

The evidence of witness admitted, subject to the right of def't to reserve the objection at the trial.

The plaintiffs said they had then twenty-five hundred dollars insurance on their stock, which was about one-half of what they valued their stock at, and that they did not care to take additional insurance. Mr. King then made what I would call a regular speech of the value of insurance, and the advantage of having their whole stock insured, and the benefit it would be to them in case of a fire. He then appealed to

me, and I said "Yes, they (the pl'ffs) ought to insure every dollar of stock they have got." The pl'ffs agreed; said they would take my advice, and agreed with the agent that they would give him the insurance of the balance of their stock. I had seen Mr. King there three times,
24 if not more. I could not tell what his business was at the other times. The third time, or the last time, was the time I heard him solicit the insurance. Aside from my observation in going in their store frequently before the fire, where I traded for groceries, I have myself had a country store, and have some experience in estimating the value of stock by general observation. In my opinion there was at least four or five thousand dollars' worth of goods. They may have had six thousand dollars' worth. I was in the store on the morning of the day on which the fire occurred, and the plaintiffs were getting in new goods on that day; boxes and barrels were before the door. I saw in the store the porter opening a cask of hams, one of which I selected, as it seemed a fine one, and left it there to be sent for. It was burnt up. I do not know what the boxes and barrels contained. The reason I went in the store that morning was that the show of goods before the door attracted my attention. When Mr. King was in the store there was a barrel of kerosene in the store. There were two or three barrels standing within three or four feet of Mr. King and myself. One of them was painted blue, and marked kerosene, from which pl'ffs retailed the article. The barrel was plainly and fully exposed to view, and Mr. King could see it if he wanted to. He could not well keep from seeing it.
25 I can't swear that Mr. King saw the barrel.

Cross-examination:

I made no careful examination; it was merely a general cursory observation, and the special attention called to it at the time the conversation as above stated occurred. The great bulk of their goods was exposed to view, dry goods on one side, groceries, hardware, &c., on the other side. I think most of the goods were exposed to view. What was in goods and barrels I don't know, as I never looked into them. The barrel of kerosene was, I suppose, a part of their stock. It was right next to a barrel of syrup. I never bought any kerosene, but I bought syrup. I do not know, either of my own knowledge nor from the admissions of plaintiffs, what was the cause of the fire.

Redirect:

There were goods under the counter, not exposed to view, containing barrels, &c., containing coffee, sugar, &c. I looked into some of them myself, some three weeks before the fire, when making some purchases. Some of the barrels under the counter I did not see into.

CHA'S PERRY.

The foregoing depositions were taken before me as stated in the caption, and the answers reduced to writing by me, and I certify that the stating of each question, both direct and cross, was expressly
26 waived by the counsel on each side; and I further certify that I am not interested in the cause, nor of kin or counsel to either party.

June 11th, 1873.

J. R. SAUSSY,
Commissioner.

(Indorsed:) Rec'd Aug't 11th, 1873, from J. R. Saussy, esq., commissioner.

Z. N. WINKLER,
Dep. Clk S. C. C. C.

GEORGIA, *Chatham County:*

CLERK'S OFFICE, SUPERIOR COURT.

I, William J. Clements, clerk of the superior court in and for the county of Chatham, said State, do hereby certify the above and foregoing 14 pages of writing to be true and perfect exemplifications of the testimony by commissioners of J. Gadsden King and Charles Perry in the case of W'm H. Lanier & Co. versus the Phœnix Insurance Company of Brooklyn, N. York, and now of file in this office.

In testimony whereof I hereto set my official signature and seal of office, at Savannah, this 25th day of March, A. D. 1874.

[SEAL.] W'M J. CLEMENTS,
Clerk S. C. C. C.

GEORGIA, *Chatham County:*

I, William Schley, judge of the superior courts of the eastern circuit of Georgia, of which the superior court of Chatham County is
27 one, do hereby certify that William J. Clements, whose name is subscribed to the preceding exemplification, is the clerk of the said superior court of Chatham County, duly commissioned and sworn, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the exemplification is the seal of the said court, and that the attestation thereof is in due form.

Dated at Savannah this the 25th day of March, A. D. 1874.

W. SCHLEY,
Judge Sup'r Court, Eas. C'rc't, G'a.

STATE OF GEORGIA,
Chatham County, ss:

I, William J. Clements, clerk of the superior court of Chatham County, in said State of Georgia, do hereby certify that the honorable W'm Schley, whose name is subscribed to the preceding certificate, is judge of the superior courts of the eastern circuit of Georgia, of which the superior court of Chatham County is one, duly commissioned and sworn, and that the signature of said judge to said certificate is genuine.

In testimony whereof I hereunto set my official signature and seal of office, at Savannah, this the 25th day of March, A. D. 1874.

[SEAL.] W'M J. CLEMENTS,
Clerk S. C. C. C.

23 *Trial.*

Whereupon the issues herein came on to be tried, to wit, on the thirteenth day of November, A. D. eighteen hundred and seventy-four, at Savannah, in the southern district of Georgia aforesaid, and on the trial thereof the following testimony was adduced:

Testimony for plaintiffs.

WILLIAM H. LANIER, of the southern district of Georgia, aforesaid, one of the plaintiffs, being duly sworn, testified in his own behalf as follows, to wit:

The foregoing policy of insurance was introduced and proved to be the policy taken out by plaintiffs. Am one of the plaintiffs. J. Gadsden King, representing the Phœnix Insurance Company of Brooklyn, several times visited our store, soliciting insurance from us for the company. I told him that stock was already insured in another company for twenty-five hundred dollars. He wanted us to take additional five

thousand in his company. We finally, at his request, agreed to take twenty-five hundred dollars in his company. We kept a retail store of general merchandise, and sold kerosene oil and gunpowder by retail, never keeping on hand, at any time, more than a barrel of kerosene at the time, from which it was drawn off as customers might purchase, and not more than a quarter of a keg of gunpowder, being not more than six or eight pounds. Mr. King was aware of this. He gave us a
29 paper to sign, which he called the application, which we did sign, asking insurance on our stock for twenty-five hundred dollars, the rate not specified in it, (a copy of which is hereto annexed.) He came back with a policy filled up, and asked for the premium. His attention was called to the terms of the printed condition not allowing kerosene, &c., to be kept, without permission in writing indorsed on the policy. He said that it did not make any difference in cases where not more was kept than we usually kept, and that no more premium was required. We told him that we did not like to pay unless the matter was all right. He said that he was not mistaken about it, but that he would see Mr. Cosens, the agent, who had the issuing of the policies. He left the store, and in a few minutes returned, saying that he had seen Cosens, and that he stated the same thing, viz, that it did not make any difference where parties did not keep more than one or two barrels of kerosene for retail purposes, nor more than eight or ten pounds of gunpowder. King then handed us the policy, and we paid him the premium. The stock of goods was burned by fire on the 8th of May, 1872, and the value of stock so destroyed was, at the time of the fire, between five and six thousand dollars. The other insurance, in the Liverpool and London and Globe Insurance Company, has been settled by that
30 company. My dealing in the matter of the insurance was entirely with Mr. King.

(In the delivery of the above testimony, defendant objected to the sayings of Cosens and King being given to the jury, and also objected to any and all parole testimony going to show permission to keep kerosene and gunpowder on the premises, permission to do so not being indorsed on the policy; and the objections were overruled by the court; to which rulings of the court the said defendant then and there excepted and assigned error thereon.

CHARLES PERRY, being duly sworn, testified in behalf of plaintiffs that the value of the stock was, in his opinion, over five thousand dollars at the time of the fire.

Testimony for defense.

WILLIAM C. COSENS, being duly sworn, testified that he was, at the time of the issuing of the policy sued on, the agent of defendant; had power to issue the policies of the company to whom I pleased, and to transact all matters for them pertaining thereto in Savannah. J. Gadsden King was employed by me to solicit insurance for the company, and his compensation was a portion of the commissions on the premiums. It was customary in Savannah to have these solicitors. He was not employed by the company directly, but only as I have said. The policy in this case, as usual, was put into his hands to be delivered to
31 plaintiffs, and he paid over the premium collected by him on the policy to me, and I paid him for his services in procuring the insurance. I don't remember that King ever spoke to me upon the kerosene matter; don't think he did.

If plaintiff had requested that written consent should have been indorsed on policy to keep kerosene and gunpowder in the manner in which they did keep it, the permission doubtless would have been given, and no additional premium required. I would have indorsed the consent on the policy, as I usually did.

EUGENE B. PHILPUT being duly sworn, testified as follows:

Was clerk in the office of W. C. Cosens, agent of defendant, at the time of the issuing of the policy sued on. Don't remember that Mr. King ever spoke about permission to plaintiffs to keep kerosene and gunpowder; am sure he never spoke of it in my presence. It is usual and customary with us to give permission of this kind, where only small quantities are kept, like in this case, without any additional or extra premium; but in such cases we indorse the consent upon the policy.

The following was introduced by defendant to show that plaintiffs knew they were dealing with W. C. Cosens, agent of defendant, and not with J. Gadsden King:

32 *Application for insurance.*

SAVANNAH, GA., 24 *Feb'y*, 1872.

WM. C. COSENS,
Insurance Agent:

Please insure against loss or damage by fire twenty-five dollars ($2,500.00) on stock of liquors, dry goods, &c., contained in brick, metal-roof store 185 south side of Congress street, between Barnard & Jefferson, for one year from date. 1st March, 1872. Loss, if any, payable to (signed) W. H. Lanier & Co.

And thereupon, after due argument by counsel on both sides, the said judge charged the jury, among other matters and things, substantially as follows, to wit:

Judge's charge.

That he, the judge, found no reason to depart from his rulings as to the admission of the evidence aforesaid, and that if they, the jury, found that any representations or conditions had been made by any agent of the defendant at the time of the effecting of the policy, that such conditions and representations must be taken into consideration, and effect given them, even though at variance with the written terms of the policy.

To which portion of said charge said defendant then and there excepted, and assigned the same as error.

33 Whereupon the said jury retired to their room, and on the fourteenth day of November, A. D. eighteen hundred and seventy-four, returned with the following

Verdict.

We, the jury, find for the plaintiffs twenty-five hundred doll's, and interest from the 8th day of July, 1872.

(Signed) WM. R. SYMONS,
Nov. 14, 1874. *Foreman.*

Upon which verdict the following judgment was entered up:

Judgment.

SOUTHERN DISTRICT OF GEORGIA:

And afterwards, to wit, on the fourteenth day of November, 1874, came the within-named plaintiffs, and the defendant came, and the jury being called, also came, to wit: William R. Symons, foreman; Levi Fowler, Moses B. Pollock, Isham Wimberly, Charles Craft, Frank Disroom, Eugene Mitchell, Lewis DeGräffenreid, Henry P. Richmond, Daniel N. Lain, Charles P. Craft, and D. C. Bacon, who, being elected, tried, and sworn to speak the truth of the within-contained, upon their oaths say, "We, the jury, find for the plaintiffs twenty-five hundred dollars, and interest from the 8th day of July, 1872."

It is therefore considered and ordered that the plaintiffs do recover from the defendant the damages aforesaid by the jury in form aforesaid, and fifty-two dollars and thirty cents for costs; and the defendant in mercy, &c.

RUFUS E. LESTER,
Pl'ffs' Att'y.

Judgment signed and filed Nov. 14, 1874.

JAS. McPHERSON, *Clerk.*

34 And thereupon, on the nineteenth day of November, A. D. eighteen hundred and seventy-four, the said defendant filed his assignment of error, and other instruments in writing necessary under the law, for the revision of the said alleged errors.

Assignment of error.

In the fifth circuit court of the U. S. for the southern district of Georgia, November term, 1874.

WILLIAM H. LANIER AND WILLIAM M. LANIER, copartners, using the firm-name of W. H. Lanier and Company,
vs.
THE PHŒNIX INSURANCE COMPANY OF BROOKLYN.

And now the aforesaid The Phœnix Insurance Company of Brooklyn, by S. Yates Levy, its attorney, comes and says that in the foregoing record and proceedings there is manifest error, in this, to wit:

First. That the court erred in admitting in evidence the testimony of William H. Lanier, one of the plaintiffs, whereby parole testimony was given to the jury to control, vary, and contradict the express terms of the written agreement between plaintiffs and defendant, to wit, the policy of insurance on which the suit was founded, in this, that the said policy, containing, among other covenants and agreements, the following clauses to wit:

"Petroleum, rock, earth, coal, kerosene or carbon oils of any description, whether crude or refined, or products thereof, benzine, ben-
35 zole, naphtha, camphene, spirit-gas, burning-fluid, turpentine, phosgene, or any other inflammable liquid, are not to be stored, used, kept, or allowed on the above premises, temporarily or permanently, for sale or otherwise, unless with written permission indorsed on this policy, excepting the use of refined coal, kerosene, or other carbon

oil for lights, if the same is drawn and the lamps are filled by daylight. Otherwise, the policy shall be null and void." * * * *

"Gunpowder, or any other articles subject to legal restrictions, it is understood and agreed, are subject to the same restrictions, prohibitions, limitations, and conditions under this policy as the articles mentioned in the section next preceding this.

"It is further understood and made part of this contract, that the agent of this company has no authority to waive, modify, or strike from this policy any of its printed conditions, nor is his assent to an increase of risk binding upon the company until the same be indorsed in writing on the policy and the increased premium paid; nor in the event that this policy shall become void by reason of any of the conditions thereof, shall the agent have power to revive the same except by issuing a new policy; and any policy so made void shall remain void and of no effect until revived by the actual issue and delivery to the assured of the new policy; and any contract by parole or understanding with the
36 agent to the contrary notwithstanding."

And it being in evidence that at the time of the fire (for loss by which said action is brought on said policy) and before there was stored on the premises destroyed or insured both petroleum and gunpowder, and there being no written indorsement on the said policy, as required by its terms aforesaid in such cases, the said judge permitted William H. Lanier, one of the plaintiffs as aforesaid, to testify to the jury that at the time of the effecting of said policy of insurance the said written indorsement of permission was then and there verbally waived by one J. Gadsden King, alleged by the said W. H. Lanier to have been then and there an agent of the said defendant; to which said admission of testimony said defendant then and there objected, and now assigns the same as error, and excepts thereto.

Second. That the court erred in permitting the said William H. Lanier then and there to testify to the jury that, at the time of the said verbal waiver by the said King, of the said written indorsement required by the terms of the policy, said King told him, the said Lanier, that W. C. Cosens, the authorized agent of the company, told him he could so act.

To which admission of testimony the defendant then and there
37 objected, and now assigns the same as error and excepts thereto.

Third. That the court erred in admitting any and all the evidence going to show a change in the provisions of the contract outside of the method provided by the contract.

Fourth. That the court erred in charging the jury that it found no reason to depart from its ruling as to the admission of the evidence aforesaid, and that if they, the jury, found that any representations or conditions had been made by any agent of the defendant at the time of the effecting of the policy, that such conditions and representations must be taken into consideration and effect given them, even though at variance with the written terms of the policy. Which said charge the said defendant assigns as error and excepts thereto.

Wherefore, and for divers other errors apparent on the face of said record, said defendant prays that the aforesaid proceedings be reversed, and said cause be remanded to said circuit court.

S. YATES LEVY,
Att'y Phœnix Ins. Co. of B.

Exceptions overruled.
November 19th, 1874.

JOHN ERSKINE,
U. S. Judge.

(Indorsed:)

38 Due and legal service acknowledged and copy waived this November 19th, 1874.

RUFUS E. LESTER, *Pl'ffs' Attorney*

Filed November 19th, 1874.

JA'S McPHERSON, *Clerk.*

Bond.

Supreme Court of the United States.

Know all men by these presents that we, The Phœnix Insurance Company of Brooklyn, principal, and Richard D. Arnold, surety, are held and firmly bound unto William H. Lanier and William M. Lanier, of the southern district of Georgia, in the full and just sum of six thousand dollars, to be paid to the said William H. Lanier and William M. Lanier, their and each of their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated this nineteenth day of November, in the year of our Lord one thousand eight hundred and seventy-four.

Whereas lately, at a term of the fifth circuit court of the United States for the southern district of Georgia, in a suit depending in said court between said William H. Lanier and William M. Lanier, plaint-

39 iffs, and The Phœnix Insurance Company of Brooklyn, defendant, a verdict and judgment was rendered against the said The Phœnix Insurance Company of Brooklyn, and the said The Phœnix Insurance Company of Brooklyn having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the said verdict and judgment in the aforesaid suit, and a citation directed to the said William H. Lanier and William M. Lanier citing and admonishing to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such, that if the said The Phœnix Insurance Company of Brooklyn shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

The Phœnix Insurance Company of Brooklyn,
By S. YATES LEVY, *Attorney.* [L. S.]
R. D. ARNOLD. [L. S.]

Signed, sealed, and delivered in the presence of—
JAS. McPHERSON, *Clerk.*

SOUTHERN DISTRICT OF GEORGIA, *ss:*

Richard D. Arnold, party to the within bond, being duly sworn, deposes and says that he is a freeholder residing in the said district, and that he is worth the sum of six thousand dollars over and above

40 all his just debts and liabilities and the amount exempted from levy and sale by the laws of the State of Georgia.

R. D. ARNOLD.

Sworn to and subscribed before me this 28th Nov'r A. D. 1874.

JA'S McPHERSON, *Clerk.*

Approved by—

JOHN ERSKINE, *U. S. Judge.*

Filed November 19th, 1874.

JA'S McPHERSON, *Clerk.*

Power of attorney.

STATE OF NEW YORK,
County of Kings:

THE PHŒNIX INSURANCE COMPANY OF Brooklyn, plaintiff in error,
vs.
W. H. LANIER & CO., DEFENDANTS IN ERROR.

Whereas the above-stated case is in process of being carried up to the Supreme Court of the United States, and it is necessary to execute the bond usual and necessary in such cases, the Phœnix Insurance Company of Brooklyn, plaintiff in error, has constituted, made, and appointed, and by these presents doth constitute, make, and appoint, Samuel
41 Yates Levy, of Savannah, Georgia, its lawful attorney to make, execute, and sign with its name any and all bonds and writings-obligatory necessary to the carrying on of said suit; hereby ratifying and confirming all that its said attorney has done or may hereafter do by reason of the premises.

In witness whereof the said The Phœnix Insurance Company of Brooklyn executes this power by affixing hereto its corporate seal and the name of its president this December 2d, 1874.

[SEAL.] STEPHEN CROWELL,
President.

CITY, COUNTY, AND STATE OF NEW YORK, *ss:*

On this second day of December, 1874, personally came before me Stephen Crowell, to me known to be the president of the Phœnix Insurance Co., who, being by me duly sworn, did depose and say that he resides in Brooklyn, New York; that he is the president of the said corporation, and that the seal attached to the within instrument is the corporate seal of said corporation, and that it was affixed by their authority, and that he signed his name by like authority.

[SEAL.] FRANCIS P. BURKE,
Notary Public, New York County. (149.)

42 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To William H. Lanier and William M. Lanier, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the fifth circuit court of the United States for the southern district of Georgia, wherein The Phœnix Insurance Company of Brooklyn is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court of the United States, this nineteenth day of November, in the year of our Lord one thousand eight hundred and seventy-four.

JOHN ERSKINE,
Judge of the U. S. Georgia Districts.

(Indorsed:)
Due and legal service acknowledged and copies waived.
RUFUS E. LESTER,
Pl'ffs' Att'y.

NOVEMBER 19*th*, 1874.

43 Filed November 19th, 1874.
JAMES McPHERSON, *Clerk.*

Writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the southern district of Georgia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, in an action of assumpsit between William H. Lanier and William M. Lanier, copartners, using the firm-name and style of W. H. Lanier and Company, plaintiffs, and The Phœnix Insurance Company of Brooklyn, defendant, a manifest error hath happened, to the great damage of the said The Phœnix Insurance Company of Brooklyn, as by its complaint appears: We, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you
44 may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the twelfth day of November, in the year of our Lord one thousand eight hundred and seventy-four.

[SEAL.] JA'S McPHERSON,
Clerk U. S. Circuit Court So. Dis't of G'a.

(Indorsed:) Filed November 19th, 1874. Ja's McPherson, clerk.

45 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Southern District of Georgia, ss:

I, James McPherson, clerk of the circuit court of the United States for the southern district of Georgia, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and that make a full and complete transcript of all the papers, depositions, testimony, exhibits, and proceedings had in the suit of W. H. Lanier & Co. against The Phœnix Insurance Company of Brooklyn, New York, as fully as the same remain on file and of record in my office.

In testimony whereof I hereunto set my hand and affix the seal of the said court at Savannah, in said district, this the sixteenth day of December, in the year of our Lord eighteen hundred and seventy-four.

[SEAL.] JA'S McPHERSON, *Clerk.*

(Indorsement on cover:) No. 43. The Phœnix Insurance Company of Brooklyn, plaintiffs in error, vs. William H. Lanier & William M. Lanier, as W. H. Lanier & Co. S. Georgia C. C. U. S. Filed 21st January, 1875.

IN THE SUPREME COURT

OF THE UNITED STATES.

No. 43.

PHŒNIX INSURANCE COMPANY,
OF BROOKLYN,

vs.

LANIER & COMPANY.

P. PHILLIPS
and W. H. PHILLIPS,
for Plaintiff in Error.

October 2, 1877.

R. O. Polkinhorn, pr.

Supreme Court of the United States.

PHŒNIX INSURANCE COMPANY, OF BROOKLYN,
vs.
LANIER & Co.
No. 43.

BRIEF OF P. & ~~H. W.~~ PHILLIPS,

for Plaintiff in Error.

Lanier & Co. brought their action to recover for loss by fire, on an insurance of their stock of groceries, by the plaintiff in error.

The policy recites that in consideration of $22.50, the Company insures Lanier & Co. against loss or damage by fire to the amount of $2,500 on his stock of dry goods, boots, shoes, groceries, liquors, *and other merchandise not more hazardous.*

The policy then provides that kerosene or carbon oils of any description "are not to be stored, used, kept, or allowed on the above premises, temporarily or permanently, for sale or otherwise, UNLESS WITH WRITTEN PERMISSION ENDORSED ON THIS POLICY, otherwise THE POLICY SHALL BE NULL AND VOID."

It is again stipulated that it is "understood and MADE PART OF THIS CONTRACT, that the agent of the company has no authority to waive, modify, or strike from this policy any of its printed conditions, nor is his assent to the increase of risk binding upon the company, until the same be endorsed in writing on the policy, and the

increased premium paid; nor in the event that this policy shall become void, by reason of any of the conditions thereof, shall the agent have power to revive the same except by issuing a new policy; and any policy so made void, shall remain void and of no effect until revived by the actual issue and delivery to the assured of the new policy, ANY CONTRACT BY PAROLE OR UNDERSTANDING WITH THE AGENT TO THE CONTRARY NOTWITHSTANDING."

The policy is signed—

STEPHEN CROWELL, *President*,
PHILANDER SHAW, *Secretary*,
WM. C. COSENS, *Agent*.

On the trial evidence was admitted of conversations with certain parties alleged to be agents of the company.

On the charge of the judge the jury found a verdict for the plaintiff, and the judgment rendered on that verdict is now here for review on writ of error.

The certificate of the clerk shows that the Record contains all the evidence that was produced on the trial, and in order to present the case understandingly, we cite the statement of the witnesses on the point in dispute.

J. GADSDEN KING testified that he was employed by Cosins, the agent, to solicit insurances;

"That at the time of taking the application and writing the policy nothing was known about keeping kerosene oil; but when the witness delivered the policy to Mr. Lanier and collected the premium, *Lanier told witness that he wished permission to keep a barrel of kerosene oil*, whereupon witness immediately went to the agent's office, and *inquired of his book-keeper and assistant, Mr. Philput*, if such permission would be granted. The reply was "yes," that it was granted, and that if Mr. Lanier desired it that he would endorse it upon the policy, but that permission being given *he did not think it necessary* to

The Italics + Roman letters are ours

so endorse it. Upon witness informing Mr. Lanier, plaintiff, of this fact, he said, since *permission was granted, he would not make the trouble of endorsement.*

In answer to the third cross-interrogatory, he says that this verbal permission was communicated to "Mr. Cosens *or his representative at his office.*" p. 17.

W. H. LANIER, one of the plaintiffs, thus states the transaction: "Mr. King gave us a paper to sign which he called the application, which we did sign. He came back with a policy filled up, and asked for the premium. *His attention was called to the terms of the printed conditions, not allowing kerosene to be kept without permission in writing endorsed on the policy.* He said it did not make any difference in cases where not more was kept than we usually kept, and no more premium was required. *We told him we did not like to pay unless the matter was all right.* He said he was not mistaken about it, but that he would see Mr. Cosens, the agent who had the issuing of the policies. He left the store, and in a few minutes returned, saying that he had seen Cosins and that he stated the same thing, that it did not make any difference where parties did not keep more than one or two barrels of kerosene for retail purposes. *King then handed us the policy and we paid him the premium.*"

This completed the evidence on behalf of the plaintiffs, which was allowed to be given in opposition to the defendants' objection, and forms the ground of his exception.

On the part of defendant, Wm. C. COSENS testified, that at the time of issuing the policy he was the agent of the Company.

"King was employed by me to solicit insurances for the Company, and his compensation was *a portion of the commissions on the premiums.* He was not employed by the Company directly, but only as I have said.

The policy in this case, as usual, was put into his hands to be returned to the plaintiff, and he paid over the premium collected by him to me, and I paid him for his services on procuring the insurance. I don't remember that King ever spoke to me upon the kerosene matter—don't think he did.

If the plaintiffs had requested that written consent should have been indorsed on policy to keep kerosene in the manner in which they did keep it, the permission would, doubtless, have been given, and no additional premium required. I would have endorsed the consent on the policy, as I usually did." (pp. 21, 22.)

EUGENE B. PHILPUT was clerk of Cosens at the time of issuing the policy. Don't remember that Mr. King ever spoke about permission to plaintiffs to keep kerosene and gun powder; am sure he never spoke of it in my presence. It is usual and customary with us to give permissions of this kind when only small quantities are kept, like in this case, without any additional premium; but in such cases we indorse the consent upon the policy." p. 22.

Upon the evidence for plaintiffs and defendants the Court gave this charge:

" That he, the Judge, found no reason to depart from his rulings as to the evidence aforesaid. And that if they, the jury, found that any representations or conditions had been made by any agent of the defendant at the time of effecting the policy, that such conditions and representations must be taken into consideration and effect given them, even though at variance with the written terms of the policy."

This charge was also excepted to. (p. 22.)

Assignment of Error.

The admission of the evidence to show an agreement by the agent to dispense with the written endorsement required by the policy.

The charge to the jury as above recited.

Argument.

From the evidence of the plaintiff himself, it is shown, that before he accepted the policy, and paid the premium, he had carefully scanned its provisions.

The assurance had been affected through the solicitation of King, who was employed by Cosens, the agent of the company, and paid by him out of the commissions allowed him on the premiums.

When King brought the policy he called his attention to the stipulation that forbade the keeping of kerosene without a written permission endorsed on the policy, "otherwise the policy to be null and void."

This condition the policy *made part of the contract*, with the declaration that the agent of the company had no authority to waive it. Yet, in face of this knowledge, and with a full understanding of these provisions, the plaintiffs contented themselves with a verbal assurance said to be made by the agent of the company, that such endorsement was unnecessary, and that a verbal permission was sufficient.

It certainly requires no argument to show that these provisions requiring any alteration of the stipulations contained in the policy, to be evidenced only by writing endorsed on the policy, and that the agent of the company should have no authority to waive them, are just and reasonable.

When a loss occurred, the party would necessarily produce the policy, and the endorsement contained

thereon would show how far the company had agreed to waive any of its conditions or stipulations. In other words, the company was not willing to be bound by verbal agreements alleged to have been made with its agents, and which would rest upon the uncertain memory of witnesses, or subject them to false and collusive testimony.

The facts of the case illustrate the propriety of the rule by which the company agreed it would be bound.

Mr. Cosens was the agent, this was well known to the plaintiffs. Their offer for insurance is addressed to him as agent. p. 22. He testifies that King never spoke to him upon the kerosene matter.

Mr. Philput, his clerk, testifies to the same effect, and both say if any such request had been made, the endorsement would have been made, as that was the custom.

Now on the other hand, King, who was the go-between, does not pretend to any certainty as to the party who gave the verbal permission relied on. He says he went to the "agent's office and inquired of his *book-keeper*, Mr. Philput, if the permission would be granted, and he said "yes," and that he communciated the fact "to Mr. Cosens, or his representative, at his office." p. 17.

As already stated he does not testify that this permission of Philput was ever communicated to Cosens the agent, but says it was to "Cosens or his representative at his office."

On this vague and contradictory evidence, the question is left to the jury to say whether the stipulation which made the policy null and void, if kerosene oil was kept or allowed on the premises, temporarily or permamently, for sale or otherwise, was not waived by agreement of the agent of the company, and if so, then effect was to be given to it even though at variance with the written terms of the policy.

Here we see that the very evil which the company attempted to guard against, to wit, the uncertain memory of witnesses, has been forced upon them in direct opposition to the express terms of their contract. On this subject, Mr. Justice MILLER in the *Insurance Company* vs. *Wilkenson*, speaking of the attempt to vary the written contract by parol evidence, says:

"The great value of the rule of evidence here invoked cannot be easily over estimated. As a means of protecting those who are honest, accurate and prudent, in protecting their contract against fraud and false swearing, against carelessness and inaccuracy, by furnishing evidence of what was intended by the parties, which can always be produced without fear of change or liability to misconstruction, the rule merits the eulogies it has received. But experience has shown that in reference to these very matters the rule is not perfect. The written instrument does not always represent the intention of both parties, and sometimes it fails to do so as to either; and where this has been the result of fraud, accident or mistake, the principle has long since been recognized, that under proper circumstances and in appropriate proceeding the instrument may be set aside or reformed, as best suits the purposes of justice. It is upon this principle that Courts of Equity proceed in giving relief; and though Courts in a common law action may be more circumscribed in the freedom with which they enquire into the origin of written agreements, such an enquiry is not always forbidden by the mere fact that the party's name has been signed to the writing offered in evidence against him.

This modification of the rule of evidence was applied to a representation for life insurance, as to which it is said, that the parol testimony makes it clear beyond question that the party did not intend to make the representation

when he signed the paper, and did not know that he was doing so, and, in fact, had refused to make any statements on the subject." (13 Wall., 231.)

In the case before us there is neither fraud, accident, mistake or ignorance. Nothing that appeals to a Court of Justice, either at law or in Equity, to relieve the party from the precise terms of the contract, or authorise the invasion of the rule of evidence, the great value of which Mr. Justice MILLER has said, "cannot be easily over-estimated."

The precise question now in issue has been frequently before the Courts.

In *Lamotte* vs. *Ins. Co.*, 17 N. Y., 199, evidence was allowed in the Court below tending to show that contemporaneous with the execution of the policy the agent agreed that the plaintiff might use camphene oil as a light in the store.

On appeal this judgment was reversed, DENIO, J., delivering the opinion, which was concurred in by all the Judges.

If, say the Court, "the use of camphene had been simply prohibited by the policy, the plaintiff would not have been permitted to show that the prohibition had been waived at the time of executing the instrument. The case is stronger in reason, though, perhaps, not in law, where there is found in the written contract a statement that the evidence of an agreement for the use of camphene *shall be in writing.* The plaintiff sought to guard against the effect of an alleged verbal agreement, by stipulating in effect that it should be of no avail. *A stronger case for the application of the rule could scarcely be stated.*"

And so in Massachusetts, in the case of *Wooster Bk.* vs. *Hartford Ins. Co.*, 11 Cush., 268, where the policy

contained the stipulation, that if the assured "shall hereafter make any other insurance on the same policy, and shall not give notice thereof to the company, and *have the same endorsed on the instrument in writing*, the policy shall cease and be of no further effect."

In the Court below it was shown that a memorandum of further insurance was presented to the agent. The agent took it to make entry thereof. He retained it, saying he had entered it, and that it would be the same as if endorsed on the policy.

The Judge charged that these facts were sufficient to authorize a recovery, and there was a verdict for the assured.

This verdict was, on appeal, set aside by the unanimous opinion of the Judges of the Supreme Judicial Court.

It is unnecessary to cite other State authorities, or to endeavor to reconcile some decisions apparently conflicting.

The assured lived in Georgia, and the company was located in New York, where the policy was executed.

We have seen from the case of *Lamotte* vs. *Ins. Co.*—*supra*—how the present case would be decided if presented in the courts of New York. If presented to the Supreme Court of Georgia, it would receive the same determination by the rule as laid down in *Sullivan* vs. *Ins. Co.* 43, Geo. 423.

In the latter case the policy contained the provision that the policy should become void if the premiums were not punctually paid. When one of the premiums became due it was agreed by the agent that its payment might be deferred, and that this should not affect the validity of the policy. The loss took place while the premium was unpaid, and it was held by the Supreme Court that the assured had no ground for a recovery.

But we maintain the question involved is one of *general law* which this Court will decide for itself independently of State adjudications, and, as we shall see, it has already done so.

In *Carpenter* vs. *Providence Ins. Co.*, 16 Pet., the policy contained the stipulation that if further assurance be not notified to the company and endorsed on the policy, the same should be void. The Court below was asked to instruct the jury, that if the company had notice in fact of the existence of another policy of insurance, "this was in law a compliance with the terms of the policy."

This charge was refused, and the Court instructed the jury, that, at law, whatever might be the case in equity, mere parol notice of such assurance was not of itself sufficient to comply with the requirements of the policy declared on; but that it was necessary in case of any such prior policy, that the same should not only be notified to the company, but should be mentioned in or endorsed upon the policy; otherwise the assurance was to be void and of no effect.

On writ of error, STORY, Justice, in delivering the unanimous opinion of the Court, says:

"We think this instruction was perfectly correct. It merely expresses the very language and sense of the stipulation of the policy; and it can never be properly said that the stipulation in the policy is complied with, when there has been no such mention or endorsement as it positively requires; and without which it declares the policy shall be henceforth void."

This case appears again in 4 Howard 224, where recovery was sought by Bill in Equity. The Court, after expressing its regret that so great a loss should happen without indemnity, say:

"It is to be remembered that the defendants gave abundant notice in the policy itself, that they would not

take risks on property insured beyond a certain ratio of its value, unless the circumstances were made known to them and the additional policy recognized in writing, so as to avoid any mistake, or accident, or want of deliberate attention to the subject."

If, after all this, the plaintiff omitted to comply with so substantial a provision of the contract itself, we see no way equitably or legally to prevent the consequences from falling on himself, rather than on others, being the result of his own neglect, or that of some of the agents he employed.

An adherance to such important rules is peculiarly necessary for the protection of absent stockholders, often interested extensively in Insurance Companies; and so far from its being unconscientious to enforce them when their existence is well known, and when the risk has been increased without conforming to them, *it is the only and just safeguard of all concerned in such institutions.*"

Speaking of the power of agents to bind their companies, with reference to the earlier decisions which limited it to the receipt of the premium and the delivery of the policy, Mr. Justice MILLER in the *Insurance Company* vs. *Wilkenson*, *supra*, says "the doctrine had a reasonable foundation at a time when companies waited for parties to come to them to seek insurance. But to apply such doctrine in its full force to the system of selling policies through agents, would be a snare and a delusion, leading, as it has done in numerous instances, of the grossest frauds, of which the Insurance Corporations receive the benefits, and the parties supposing themselves insured are the victims."

The tendency, says the Justice, of the modern decisions in this country "is steadily in the opposite direction."

But the question still remains are the powers of the

agents unlimited. Has the corporation no ~~power~~ right to protect itself against an improper exercise of these powers?

On this the Justice continues: "The powers of the agent are *prima facie*, co-extensive with the business entrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals. An Insurance Company establishing a local agency must be held responsible to the parties with whom they transact business for the acts and declarations of the agent, *within the* scope of his employment, as if they proceded from the principal."

We accept this definition, for it is sufficient to rule this case in favor of the company.

Assuming it to be true that Cosins, the agent, told the plaintiffs that they might keep on their premises kerosene oil, and that the verbal permission was all that was necessary, and that the plaintiffs therefore did not urge that this should be endorsed on the policy, then the question arises, was the agent acting *prima facie* in accordance with the business intrusted to him. In other words, was he acting within the "scope of his employment."

The answer is, that the plaintiffs knew that the policy made it an essential part of the contract that such a permission *could only be given by an endorsement on the policy, and that by its express terms the agent was prohibited from waiving this condition.*

Instead of there being a *prima facie* case of authority in the agent, which the plaintiff below could invoke for his protection, he presents the case of dealing with an agent, *with full knowledge that he had no authority.* To hold the principal bound under these circumstances would destroy the whole doctrine of principal and agent.

P. PHILLIPS,
W. H. PHILLIPS,
for Plaintiff in Error.

1 OCTOBER, 1877.

THE PHŒNIX INSURANCE COMPANY, OF BROOKLYN,
Plaintiff in Error,
vs.
WILLIAM H. LANIER AND WILLIAM M. LANIER, AS W. H. LANIER & CO.

Supreme Court United States.

No. 43.

BRIEF OF RUFUS E. LESTER AND JULIAN HARTRIDGE

FOR DEFENDANTS IN ERROR.

I. The ruling of the Court was not error, because the testimony admitted was not applicable to the issues raised by the pleading and did not in any way affect them.

This was a suit upon a policy of insurance, and the only plea was the general issue. Record, pp. 1 and 9.

The pleadings were regulated by the mode of practice in the Georgia State Courts.

Suit commenced in Superior Court of Chatham county, December 22, 1872. See Record, p. 9.

Removed to United States Court July 3, 1873. See Record, p. 14. See U. S. Revised Statutes, p. 173, § 914.

Pleadings in Georgia are regulated by statute, as follows:

"Ordinary suits in the Superior Court shall be by petition to "the Court, signed by the plaintiff or his counsel, fully and dis-"tinctly setting forth his charge or demand.

Code of Georgia, § 3332.

The defendant "shall make his defense in writing, which shall "plainly, fully and distinctly set forth his defense, * * * "which said answer shall contain as many several matters as "such defendant may think necessary for his defense."

Code of Georgia, § 3452.

(Upon the construction of this section, see 1 Kelly R., 68; 2 ib, 258, 13 Ga., 192; 18 Ga., 496; 35 Ga., 320; 45 Ga., 144).

"The petition and answer shall be sufficient to carry the "cause to the jury without any replication or other course of "pleading.

Code of Ga., 3455.
Code of Ga., 3346.

"The general issue is a denial of the allegations in the "plaintiff's declaration, and shall be considered filed in all cases "which are answered to at the first term; and no other evidence "is admissible under such plea, except such as disproves the "plaintiff's cause of action; all other matters in satisfaction or "avoidance must be specially pleaded."

Code, § 3458.

The parties, then, were at issue only upon such matters as it devolved upon plaintiff to prove under the general issue. That plaintiff did not keep kerosene oil, or that if he did the agent assented to it in writing endorsed upon the policy, was not a matter involved in the general issue, and therefore was irrelevant and immaterial: Johnson vs. Ballingall, 1 Kelly, 68, (70 bot.); Buchanan vs. Dill, 1 Kelly, 256; 41 Ga., 409, 660; 42 Ga., 283; 44 Ga., 197.

As especially applicable to this question in insurance cases, see Marine Insurance Company vs. Hodgson, 6 Cranch, 206; Maher vs. Hibernian Insurance Company, 6 Hun., (N. Y.) 353.

Cassacia vs. Phœnix Ins. Co., 28 Cal., 628; Dyer vs. Piscataqua Fire Ins. Co., 53 Maine, 118; Carton vs. Monmouth Mutual Fire Ins. Co., 54; *Ibid.*, 170; Fogg vs. Griffin, 2 Allen, 1; Williams vs. Mechanics' and Traders' Ins. Co., 54 N. Y., 577.

It makes no difference that the fact is disclosed by plaintiff's evidence: Haskins vs. Hamilton Mutual Ins. Co., 5 Gray, 342; Mulry vs. Mohawk Valley Ins. Co., 5 Gray, 541.

II. The ruling of the court was not error, even if the pleadings made the evidence excepted to applicable to the issue.

It appeared in evidence that insured kept kerosene oil and gunpowder for sale in quantities which required no extra premium, and for which permission was granted as *a matter of course* by the usage of the company. (See testimony of Cosens, Record p. 21, (2 top); of Philpot, Record p. 22; of Lanier, p. 21,) that consent to keep kerosene oil, &c., was not endorsed in writing on the policy; that Cosens was the agent of the company with power to issue policies, (see Cosens' testimony, p. 21); that King was a solicitor for insurance appointed by him "*to solicit insurance for the company*," (it); that King solicited this insurance, delivered the policy, and received the premium, knowing at the time of *the application* (see Lanier's testimony, p. 21,) that kerosene oil, &c., were kept and were to be kept; that King informed insured that it was not necessary to have endorsement upon policy of permission to keep ker-

osene oil in so small quantities as they kept, and it was in evidence that King submitted this question to the manager of the head office of the company, and that it was stated not to be necessary.

The exceptions are to the admission of the parol evidence to show that kerosene oil was kept with the knowledge and assent of the agent, known at the time of the application for the insurance.

The evidence all shows that if the written permission was not endorsed upon the policy it should have been, because the right to keep the oil was a part of the consideration moving to the insured for the contract of insurance, and it was the duty of the agent so to endorse it if it were necessary; and it would be to permit the insurer to take advantage of his own wrong to defeat the recovery upon the ground that the insurer had not done something which he ought to have done.

The idea that the insured should have gone into equity to have compelled the reformation of the contract, has no application.

There may be a parol waiver of a condition in an insurance policy, notwithstanding it may be provided in the policy that it shall not be waived except in writing: Parker vs. Atlantic Ins. Co., 1 N. Y. S. C., 397; Van Allen vs. Farmers' Joint Stock Ins. Co., 4 Hun., (N. Y.) 419.

Verbal notice to the agent that kerosene and gunpowder are kept on premises for sale, is notice to the company; and if after such notice the policy is issued with provision that if such articles are so kept without written permission the policy shall be void, it is a waiver of the condition: May on Insurance, secs. 131–132, 140–142; 12 Mich., 202; 4 Kern., 253; Columbia Ins. Co. vs. Cooper, 50 Penn. St., 331.

A person dealing with an agent of an insurance company has the right to suppose that he is dealing with the company—the fault of the agent cannot work to the injury of the assured. (It was the duty of the agent to endorse this permission if it were necessary that it should be endorsed, and it was his fault if it were not done.) The doctrine of estoppel applicable: The Southern Ins. Co. vs. Lewis Bro., 42 Ga., 587, (593); Code, (Ga.) 2753; 41 Ga., 660, (674); 40 Ga., 135; 26 U. C. Q. B., 552; 18 Md., 26; May on Insurance, §498; 18 N. Y., 392; 22 Mich., 473; 21 Mich., 246; *Ibid.*, 146; 55 Ill., 213; Union Mut. Ins. Co. vs. Wilkinson, 13 Wallace, 222; Miller vs. Mutual Benefit Life Ins. Co., 31 Iowa, 216.

The provision that requires permission to keep kerosene oil to be endorsed in writing on the policy is only a question of evidence, and does not affect the merit of the contract of insurance.

Julius Kastrige
R. E. Lester